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in the
Supreme Court
of the
United States

October Term, 1969

No. 927

JOHNNY WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the District Court of Appeal, Third District of Florida

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District. Williams v. State of Florida is reported at 224 So.2d 406 (Fla. 3rd D.C.A. 1969) App. 93.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1257 (3) on the premises that the State statute of Florida 913.10(1) (1967) is repugnant to a right and privilege claimed under the Constitution of the United States. This Court granted Certiorari on December 8, 1969. App. 95)

QUESTIONS PRESENTED

ARE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION VIOLATED BY A STATE REQUIREMENT THAT A DEFENDANT DISCLOSE, TEN DAYS IN ADVANCE OF TRIAL, HIS ALIBI DEFENSES?

DO THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT ENTITLE A STATE DEFENDANT TO A TRIAL BY A TWELVE-MAN JURY IN A NON-CAPITAL CASE?

STATUTES INVOLVED

Florida's Rule of Criminal Procedure 1.200:

"Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and

time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name

and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule."

Florida Statutes, Section 913.10(1) (1967)

"(1) Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases."

STATEMENT

The petitioner in this cause was the defendant in the trial court. The respondent, the State of Florida, was the prosecution. For purposes of clarity, the parties will be referred to as they stand in this Court.

The petitioner was charged by Information with the crime of robbery in violation of Florida Statutes, Section 813.011 on March 20, 1968. (App. 1-2)[1] Prior to trial on

[1] "App." references are to the separate appendix filed pursuant to Rule 36. The appendices in this Brief will be cited as "Appendix A", etc.

July 3, 1968, the petitioner filed defensive motions, among these was a motion to impanel Twelve Man Jury. (App. 3, 9, 87) Said motion was denied (App. 4, 8, 9, 88) Petitioner then filed a Motion for a Protective Order (App. 5) alleging that Florida Rule of Criminal Procedure Rule 1.200 (Notice of Alibi) (Appendix A) violates the Fifth and Fourteenth Amendment of the United States Constitution in that it "compels the defendant in criminal case to be a witness against himself."

The Motion for a Protective Order was denied (App. 6) and the petitioner complied with the demand, the alleged alibi witness was summoned to the office of the State Attorney and gave testimony prior to trial. (App. 58) The State Attorney complied with the provisions of Rule 1.200 by supplying the date, place, and time the alleged crime occurred. (App. 7) The petitioner was convicted and sentenced to life imprisonment. (App. 86) Motion for new trial was timely filed (App. 87) and denied. (App. 88)

The petitioner appealed to the District Court of Appeal, Third District. (App. 88) The District Court of Appeal, affirmed the conviction, holding that Florida Rule of Criminal Procedure 1.200 did not violate one's privilege against self incrimination and additionally that his constitutional rights were not violated when the trial court denied his request for a trial by a jury of twelve instead of six. (App. 94) The court cited as authority, *Duncan v. Louisiana*, 391 U.S. 145 (1968). See also *Williams v. State*, 224 So.2d 406 (Fla. 3rd D.C.A. 1969).

A petition for Writ of Certiorari was filed in this Honorable Court, to which the State of Florida responded. This Court granted Certiorari on December 8, 1969. (App. 95)

SUMMARY

The provisions of Florida Rule of Criminal Procedure 1.200 is not a rule of substantive law and therefore does not violate a defendant's right against self-incrimination. There is nothing which compels a defendant to incriminate himself nor is there anything which compels him to give any information to the prosecution, unless he voluntarily and for his own benefit intends to use an alibi defense. *People v. Rakiec*, 289 N.Y. 306, 45 N.E.2d 812 (Ct. of App. 1942) which affirmed 260 App. Div. 949, 23 N.Y.S.2d 607 (Sup. Ct. 1940).

The purpose of the Notice of Alibi Rule is to prevent surprise and to aid with the orderly administration of Criminal Justice. Time and money are saved since if the prosecutor is satisfied after his investigation that the alibi is true, the case may be dismissed or the information nolle prossed. Moreover, no continuance is necessary to determine the validity of the alibi or to make further preparation. If the investigation indicates that the alibi is false or that the defendant's witnesses are not credible, the prosecutor can prepare his attack accordingly. Finally, because of the investigation to refute perjury and fraud, alibis will be given more weight and respect since the prosecution may be unable to overcome the validity of a proper assertion of a defendant's exculpating set of circumstances.

A JURY OF LESS THAN TWELVE IN A STATE CRIMINAL TRIAL.

The "due process" clause of the Fourteenth Amendment and the Sixth Amendment of the Federal Constitution do not entitle a State defendant to a jury of twelve persons.

The holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), did not indicate that a trial by a jury of *twelve* should be applied to the several states. The rational of *Duncan v. Louisiana*, supra, specifically indicated "When" a jury should be held. The number of jurors in criminal trials has always been a matter for state administration of criminal justice. Florida has always complied with the mandate that one should be tried by a jury of his peers and the verdict should be unanimous.

The requirement that one be tried by a jury of twelve persons has application only to the federal government. *Maxwell v. Dow*, 176 U.S. 581 (1900). The language of *Maxwell*, supra, indicates that the use of an eight man jury was acceptable. The State of Florida respectfully urges that the mandate of the due process clause of the Fourteenth Amendment is not violated whenever a defendant is tried by standards equally applied, and the jury serves to prevent the oppression that is often used by federal and state governments.

ARGUMENT I

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION ARE NOT VIOLATED BY A STATE REQUIREMENT THAT DEFENDANT DISCLOSE HIS ALIBI DEFENSES PRIOR TO TRIAL.

(A) FLORIDA'S PROCEDURE FOR REQUIRING ADVANCE NOTICE OF ALIBI IS FUNDAMENTALLY FAIR AND NOT VIOLATIVE OF THE FIFTH AMENDMENT.

The petitioner alleges that Florida's "Notice of Alibi" rule is unconstitutional in that it violates the Fifth Amendment and the Fourteenth Amendment of the Federal Constitution. Regardless of the allegations of the petitioner, Florida's Rule of Criminal Procedure 1.200 (Appendix A) is constitutional and not designed to compel a defendant to say anything. Rather it requires the disclosure if, and only if, the defendant plans to assert the defense of alibi at trial. The petitioner can not allege that being required to give notice of his defense incriminates him, for the Constitution does not shield a defendant from the consequences of a defense which he chooses to employ, nor does the Constitution grant him the right to so defend as to deprive the state a chance to check the veracity of his position. The constitutional challenge has long been rejected by both federal and state courts. *Rider v. Crouse*, 357 F.2d 317, 318 (10th Cir. 1966); *State v. Stump*, 254 Iowa 1181, 119 N.W.2d 210, 219 (Sup. Ct. 1963), certiorari denied, 375 U.S. 853, 11 L.Ed.2d 80 (1963); *People v. Rakiec*, 250 App. Div. 452, 23 N.Y.S.2d 607, 612, 613 (1940); *State v. Baldwin*, 47 N.J. 379, 221 A.2d 199, (1966), certiorari denied 385 U.S. 980, 87 S.Ct. 527 (1966); 1 Wharton, Criminal Evidence, (12th Ed. 1955) Sec. 23, p. 75; 2 Underhill, Criminal Evidence (5th Ed. 1956) Sec. 440, p. 1110; *People v. Schade*, 161 N.Y. Misc. 212, 292 N.Y.S. 612 (Cty. Ct. 1936); *Commonwealth v. Vecchiolli*, 208 Pa. Super. 483, 224 A.2d 96, 99 (Super. Ct. 1966); *State v. Dodd*, 101 Ariz. 234, 418 P.2d 571, 574

(Sup. Ct. 1966); *People v. Rakiec*, 260 App. Div. 452, 23 N.Y.S.2d 607, 612, 613 (3rd Dept. 1940); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (Sup. Ct. 1931).

The petitioner would have this Court to believe that all evidence obtained from a criminal defendant is protected by the Fifth Amendment of the United States Constitution. Not true. Defendants have been subject to: Disclosure of records and documents kept by defendant in compliance with state or federal statutes, *Shapiro v. United States*, 335 U.S. 1 (1947); *Stillman v. United States*, 177 F.2d 607 (9th Cir., 1949); furnishing samples of handwriting, *Gilbert v. California*, 384 U.S. 985 (1966); Appearing in lineups, *United States v. Wade*, 388 U.S. 218 (1967); Blood samples and test; *Schmerber v. California*, 384 U.S. 757 (1966); Appearing in lineups. *Commonwealth v. Johnson*, 201 Pa.Super. 448, 193 A.2d 833 (1963); Posing in court for identification purposes, *People v. Clark*, 18 Cal.2d 449, 116 P.2d 56, 62 (1961); Medical examination of a prostitute for venereal disease pursuant to a state statute, *Ex parte Flowler*, 85 O.Cr. 64, 184P.2d814, (1947); Furnish names of witnesses who testify on an impotency defense, *Jones v. Superior Court of Nevada County*, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); Laws requiring a driver to stop and identify himself after an accident, *People v. Rosenheiner*, 209 N.Y. 115, 102 N.E. 530 (1913); Disclosure of a letter addressed to wife sent from jail while awaiting trial for murder, *State v. Grove*, 65 Wash.2d 525, 398 P.2d 170 (1969).

In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), this court held "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment, the right of a person to remain silent unless he *chooses to speak* in the unfettered exercise of his own will, and to

suffer no penalty . . . for such silence." The defendant who wishes to comply with the "Notice of Alibi" rule and subsequently not employ such defense at trial is protected by the provisions of the Fifth Amendment and the Fourteenth Amendment of the federal Constitution. The right of the defendant to remain silent or refuse to use his alibi witness, or to stand mute cannot be commented upon by the prosecution. In other words, if after compliance with the "Notice of Alibi" rule by a defendant, he chooses not to use his alibi, the "fundamental fairness" protects him from any inference which may be infered from his silence of that defense or his silence *in toto*.

Basic in the philosophy of American trials is the search for truth. Persuasive language is found in *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 163 N.W.2d 177, 180, 181 (1968):

> "When a witness takes the stand, he swears or affirms that he will tell the truth, the whole truth and nothing but the truth. What is constitutionally protected is the right of a defendant to testify truthfully in his behalf. An alibi is not one of several alternative defenses that can be simultaneously asserted. If what the statute terms an alibi is found in truth and in fact, the defendant was not present to commit the offense charged. If this is the situation, the defendant suffers no prejudice by the requirement of advance notice of intention to establish such fact. If we are discussing the right of a defendant to defer until the moment of his testimony the election between alternative and inconsistent alibis, we have left the concept of the trial as a search for truth far behind."

The State of Florida takes the position that its "Notice of Alibi" Rule is a Rule of procedure and not one of substantive law. Consistently it has been held that each state may regulate the procedure of its courts in accordance with its own ideas of policy and *fairness*, unless, of course the procedure offends a principle of justice which is considered fundamental. See *Bute v. Illinois*, 333 U.S. 640 (1947).

Florida has operated under a system of fairness *both* to the public and the accused. Both the individual and society are entitled to due process and any deprivation of the right to fairness to public or individual weakens the administration of criminal justice. The constitutionality of the "Notice of Alibi" rule should not be disturbed so long as it is *uniformly* applied to all who may be in a situation wherein there is need for such.

Additionally the patent evidence of fairness is seen from Florida's Rule of Criminal Procedure 1.220 (Appendix B), which must be read in conjunction with Rule 1.200 in order that the picture of pre-trial discovery in Florida is not distorted.

Rule 1.220 provides for almost unlimited discovery by the defendant in order for him to better prepare his defense. A defendant nearing trial is allowed under the provisions of the Rule, to obtain the names and addresses of all the State's witnesses, as distinguished from merely those on whose evidence the information, or indictment is based. He additionally can depose the witnesses to his advantage or disadvantage as the case may be. The purpose of this rule is to afford the defendant relief from situations where witnesses refuse to "cooperate" by making pretrial

disclosures to the defense. Rule 1.200 compares favorably with Rule 16(c)[2] of Federal Rules of Criminal Procedure, (Appendix C) which provides to a limited degree discovery by the federal government. This Court has long subscribed to the philosophy of discovery in criminal cases for the defendant. "It was intended by the rules [the Rules of Criminal Procedure] to give some measure of discovery" *Bowman Dairy Co. v. United States*, 341 U.S. 214, 218 (1951). However, in July, 1966, under its rule making power,[3] this Court placed its stamp of approval on Rule 16(c) which provides for some discovery by the federal government in criminal trials.

The adoption of Rule 1.220, and other related pretrial discovery measures, evinces Florida's continued concern for fair trials within her boundaries. However, the presence of Rule 1.200 would indicate that the public expects to receive from the defendant the same basic consideration in the search for truth that this Court has previously held the prosecution must also give. See, e.g. *Brady v. Maryland*, 373 U.S. 83 (1963).

When viewed in light of fundamental fairness to both the defendant and the State, the "Notice of Alibi" statute affords no greater advantage to the State than it does to the defendant. In reality, it balances the scales in the search for truth.

Under the provisions of Florida's Rule 1.200, the State is *required* to furnish the defendant with the name of witnesses it expects to use to rebut the testimony of the alibi witness. The specific language of the Rule is as follows:

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[2]Appendix C.

[3]18 U.S.C., Sec. 3771 (1964 ed.)

> ". . . Not less than five days after receipt of the defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as known the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall have a continuing duty to promptly disclose the names and addresses of the additional witnesses which come to the attention of either party subsequent to the filing their respective witness list as provided in this rule . . ."

The foregoing passage shows that the State does not intend to have the defendant placed in a disadvantageous position of wondering who will testify against him. It affords the defendant the opportunity to interrogate, investigate and more effective present his defense. The same duty that is placed upon the defendant is placed upon the State, thus making each *pari causa.*

Furthermore, the "penalty" provisions for non-compliance with the alibi rule are also reasonable. Under the Florida rule, if the defendant fails to give the required notice, the judge *may* (he is not required to) exclude the alibi witnesses (although he may *not* exclude the defendant's own personal alibi testimony).

Thus, with regard to the judge's power, "he may waive any requirements [of the rule] for good cause shown." "Author's Comment", Fla. R. Crim. P. 1.200, 33 Fla. Stat. Anno. This means that even if there is non-

compliance with this notice rule (or any Florida discovery rule) and the trial judge excludes the witnesses' testimony, the defendant still has the remedy on appeal of demonstrating the exclusion was an abuse of discretion under the facts of the case. *Cacciatore v. State*, 226 So.2d 137 (3rd D.C.A. Fla. 1969). In this regard the Florida courts have shown no hesitation in reversing an exclusion where the non-compliance was due to counsel's inadvertance or mistake. See, e.q., *Wilson v. State*, 220 So. 2d 426 (3rd D.C.A. Fla. 1969).

The alibi Rule does not infringe on the privilege against self-incrimination. Rather, it set up a wholly reasonable rule of pleading which in no way compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial, thereby waiving any Fifth Amendment privilege with respect thereto. It is urged that no constitutional issue turns on the timing of disclosure.

Mr. Justice Traynor, Chief Judge of the California Supreme Court had the following persuasive words to say:

> "Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defense. Surely he can make that decision before the trial if he is given discovery of the prosecutor's case before trial." Roger J. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y. U.L. Rev. 228, 248-49 (1966).

The defendant is the sole judge of what he is going to do and he is not compelled in any sense to be a witness against himself but only to give certain information to the prosecution if he intends to submit an alibi. Moreover, the information sought by the prosecution is not as to matters which the defendant says may *incriminate* him, but as to the matters which the defendant says may *exonerate* him. The rebuttal to the claim of self-incrimination can be answered with a long established principle of law: the prosecution must establish defendant's presence at the scene of the crime and the defendant need not establish that he was elsewhere. Alibi is not an affirmative defense as to which the defendant has assumed the burden of proof. *Commonwealth v. Choate*, 105 Mass. 451 (1870).

In a majority of jurisdictions the correct rule is adopted;—that it is a necessary part of the governments case to show, when disputed, that the defendant was present at the scene of the alleged act at the time when he was claimed to have committed an act against the peace and dignity of the state. Subsequently, it has been held that while the burden is on the defendant to introduce evidence sufficient to raise reasonable doubt, the burden of proof still continues to be on the prosecution as to the necessary element of its case. *Glover v. United States*, 147 Fed. 426 (8th Cir. 1906)

Under the provisions of the Fourteenth Amendment of the federal Constitution, the due process clause does not require that proceedings in state courts shall be according to any particular mode, and the requirement of "due process is complied with, if timely notice is given defendant, and he has opportunity to defend, and trial

is thereafter had in accordance with regular course of procedure under the state practice. *Fryberger v. Parker*, 28 F.2d 493, 496 (C.C.A. 8th Minn. 1925).

It is noteworthy to mention that pre-trial discovery in favor of the defendant is not required by due process of law. (See 18 U.S.C. Sec. 3500); *Palermo v. United States*, 360 U.S. 343, 349 (1959); *People v. Riser*, 47 Cal. 2d 66, 305 P.2d 1 (1956); *Campbell v. United States*, 365 U.S. 85 (1961). Therefore when Florida courts allow discovery by the defendant are not acting under constitutional compulsion, but to promote the orderly ascertainment of the truth.

Florida maintains that this procedure should not be a one-way street. Mr. Justice Cardoza once opined; "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.", *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

(B) THE PURPOSE OF THE RULE IS THE FURTHERANCE OF A LEGITIMATE STATE INTEREST—THE PREVENTION OF PERJURY.

Several reasons exist for the rule to the advantage of both the defendant and the prosecution in this very neglected area of criminal procedure in the law. It was designed to prevent the sudden "popping-up" of witnesses to prove that the accused was not at the scene of the crime at the time of its commission and thus creating a "reasonable doubt" about the testimony of state's witnesses.

The bringing into the courtroom of "phoney alibi" witnesses at the eleventh hour and at a time which, in practice affords the prosecutor no opportunity to check either the credibility of the witnesses or the accuracy of their statements is avoided by the "Notice of Alibi" Rule. Surely it cannot be argued that there is a "right" to use perjured testimony in a criminal trial.

The rule is further designed to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated unless the trial is recessed to that end. Modern trend in discovery is to broaden access to material facts and reduce belated surprise, *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *State v. Martin*, 410 P.2d 132 (1966) 2 Ariz.App. 510; *State v. Stump*, 119 N.W.2d 210 (1963) 254 Iowa 1181.

Since alibis can be readily fabricated, the "Notice of Alibi" Rule is intended to erect safeguards against its wrongful use. *State v. Nooks et al.*, 174 N.E. 743 (1930), 123 Ohio St., 190.

The pivotal issue is one of basic public policy as to how completely pre-trial discovery and inspection in criminal cases should be analogized to that in non-criminal cases.

The Supreme Court of Wisconsin had the following to say about notice in an alibi case before it:

> "If a criminal trial is viewed as a draw poker game with all cards to be held close to the chest until played, this can be seen as requiring a tipping of one's hand in advance. However, if a criminal trial is viewed, as a search for the

> truth, with every protection provided for investigation and preparation and to insure against the conviction of the innocent, notice requirements forward the purpose of the process. *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 131; 163 N.W.2d 177, 180 (1968).

Criminal trials since their very beginning have been searches for the truth of a particular situation. Petitioner would have this Court strike down the notice of alibi rule because he argues it "abridges" or creates a "chilling effect" upon his Fifth Amendment rights. Respondent submits that the only effect of ruling in petitioner's favor would be to create a "chilling effect" on the veracity of alibi witnesses' testimony.

ARGUMENT II

(A) THE PURPOSE OF JURY TRIAL IN THE ANGLO-AMERICAN SYSTEM.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court discussed the historical purpose of a jury trial.

> "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more

> tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in determination of guilt or innocence." *Duncan*, supra at 156.

The jury, as defined by the foregoing telling passage, is a buffer between the defendant and oppression by the State and its officers.

(B) THE FEDERAL STANDARD REQUIRES ADHERENCE ONLY TO THE ESSENTIAL ELEMENTS OF THE COMMON LAW JURY.

The general, overriding federal rule is that only the *essentials* of a jury trial, as it was at the time the Constitution was adopted, must be maintained. *Galloway v. United States*, 319 U.S. 372 (1943).

The older decisions of this Court have maintained the following as essentials of jury trials:

1. In all serious offenses a defendant shall have the right to a jury trial. The line of demarcation between serious and petty offenses is laid out in *Duncan*, supra; and

further this Court there stated the severity of the punishment authorized for the offense may change the character of the petty offense to a serious one, thus, making the trial by jury, a must.

2. It has been the standard under federal law, since the adoption of the common law, that a verdict in a criminal trial must be unanimous. *Patton v. United States*, 281 U.S. 276 (1930).

3. Additionally, the requirement of a *twelve* man jury was long ago established. *Thompson v. Utah*, 170 U.S. 343 (1898).

(C) WHAT PARTS OF THE FEDERAL STANDARD ARE REALLY ESSENTIAL?

1. *TRIAL BY JURY IS ESSENTIAL IN SERIOUS OFFENSES TO FULFILL THE JURY'S PURPOSE.*

This Court correctly interpreted the concept of trial by jury in serious offenses to be essential to the common law concept of the right. It is repulsive to the respondent that any man would be deprived of a jury trial when charged with a serious offense, carrying the possibility of over six months in prison. The possible oppression by government, in these cases, can only be checked through the deliberations of the defendant's peer group. When life and liberty are the freedoms to be lost, the jury of one's peers fight the battle of containing government within the bounds established by the Constitution. Moreover, respondent agrees that trial by jury should be furnished when an offense has been "classified" as petty, but the authorized punishment may convert it into what is a serious offense, thus vesting the defendant with trial by jury.

2. *UNANIMOUS VERDICTS ARE ALSO ESSENTIAL TO FULFILLING THE JURY'S PURPOSE.*

The federal standard requires that the verdict be a unanimous one. Florida agrees, from a very practical view, that this rule of the common law should be maintained. The right to life and liberty are so precious that it should not be deprived unless it is with the consent of *all.* Florida follows the common law and the federal law in this regard, since it considers unanimity vitally essential to the jury system. Additionally, the unanimous jury verdict is etched in our political and civic institutions.

A person on trial for life should not be subject to the decision of ten out of twelve people, nor should he be subject to five out of six; rather, the verdict of this precious gift of life or liberty must not be taken away, unless all agree. To allow a conviction to rest upon less than unanimity is to abrogate the rule that guilt must be proven beyond and to the exclusion of every reasonable doubt.

3. *THE EXISTENCE OF TWELVE JURORS IS NOT ESSENTIAL TO FULFILLING THE JURY'S PURPOSE.*

When the function of the jury is reviewed, there is no essential reason for requiring any particular number of jurors. That function has as its purpose, the prohibition of oppression by the government and the checking of power unjustly used by the prosecution or the judge.

The old standard of twelve used by the federal government is but a carry over from the common law in existence at the time the Constitution was adopted; nothing more.

Mr. Justice Harlan expressed in his dissenting opinion in *Duncan v. Louisiana*, supra, at 182, a view the respondent supports:

> "I should think it equally obvious that the rule, imposed long ago in federal courts, that, 'jury' means 'jury of exactly twelve' is not fundamental to anything: there is no significance except to mystics in the number 12."

The number twelve has come to us from a source which is of doubtful validity, in light of the anti-establishment clause of the First Amendment. "All the early cases speak of twelve as composing the jury because Lord Coke said, 'the law delighteth in the number twelve and it is much respected in the Holy Writ, as twelve apostles, twelve stones, twelve tribes, etc.' " *In Re Report Grand Jury*, 11 So.2d 316, 317 (Fla. 1943). The use of the number twelve in the Holy Writ is frequent indeed.

> "He called unto him his twelve disciples. He had many more. . . . Twelve was the number of the Jewish Church, the Church of the twelve patriarchs: it is the number of the Christian Church, the Church of the twelve apostles. . . . [I]n the heavenly Jerusalem, the city of the living God, which hath twelve gates, twelve angel-guardians, twelve foundations, the length and breadth and height of which are each twelve thousand furlongs." H. Spence, 33 THE PULPIT COMMENTARY, THE GOSPEL ACCORDING TO ST. MATTHEW, 418 (1943).

While the number twelve has been around for centuries, it is not essential to the function of the jury, given the latter's purpose in our judicial system.[4] It is the respondent's position that six persons can provide protection from oppression as well as twelve persons.[5]

Respondent here only argues what should be the constitutionally required *minimum* number of jurors in order to fulfill the essentials of the jury right at common law. The rationality of providing *more* than six jurors (which respondent maintains meets the constitutional minimum) in certain cases has not been raised herein.

In fact, the petitioner has advanced no rational reason nor advanced any statistical support for the proposition that it is essential to have twelve jurors in order to fulfill the jury's purpose. Respondent submits this dearth of reason or authority stems from the fact that experience demonstrates the impotency of petitioner's position.

For example, in the Worcester, Massachusetts District Court the legislature authorized six man juries on an experimental basis in civil cases. A study of this experiment concluded that the six man juries resulted in "prompt trials and lower costs" with verdicts "*no different than those returned by twelve member juries.*" "Six-Member Juries Tried in Massachusetts District Court", 42 *J.Am.*

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[4]The practice of using six member juries in felony cases is also of long standing in Florida. They were first provided for by constitutional amendment in 1875. *Gibson v. State*, 16 Fla. 291 (1877).

[5]Respondent here notes that Fla. Stat. 913.10 does provide for twelve member juries in capital cases; however, the petitioner has not raised an "equal protection" argument on this ground at any stage of the case sub judice.

Jud. Soc'y., 136 (1958). The same conclusions were reached in a New Jersey six member jury experiment. "New Jersey Experiments with Six-Men Jury", 9 *Bull. of the Section of Jud. Ad. of A.B.A.*, (May 1966).

The text writers and jurists agree that there is nothing significant about the number twelve, except it was the number used in trials when we adopted the Constitution; it follows that to have twelve persons is *not* an *essential* part of the jury system as it existed at common law.

To hold there is a state violation of the due process clause simply because a defendant is tried in a state court by less than twelve men, rather than an even number of twelve, would seem to be contrary to the thoughts and philosophy of a great jurist of the 19th Century:

> "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past." MR. JUSTICE HOMES, "THE PATH OF THE LAW," 10 *HARV. L. REV.*, 457, 459 (1897)

(D) THE TWELVE MEMBER REQUIREMENT SHOULD NEITHER BE INCORPORATED INTO DUE PROCESS NOR REMAIN AN ESSENTIAL ELEMENT OF THE FEDERAL STANDARD.

Respondent submits that, based upon the foregoing analysis, the twelve member requirement should be recognized for what it is—the vestigial remains of early common law mystical religious thought, and it thereby should not be incorporated upon the States nor retained as an essential element of the federal constitutional standard.

Respondent urges this Court to re-affirm the requirement of a jury trial in all serious offenses as a requiste of due process. Respondent further urges that this Court re-affirm and incorporate the requirement of unanimous verdicts in all criminal cases as an essential element of due process and the federal standard, since a conviction where 20% or 25% of the jurors believe the defendant's innocence is contrary to the burden of proving guilt beyond a reasonable doubt.

Respondent simply submits that the "numbers game", i.e., the twelve member requirement, is not essential to maintaining the features of the common law jury right and thus six member juries should be constitutionally permissable in both State and federal courts. Petitioner has advanced no reason why a six member jury in any way diffuses the jury's effectiveness in fulfilling its fundamental purpose as announced by the Court in *Duncan*.

On the contrary, experience with six member juries demonstrates they achieve the same result as their twelve member counterparts with a considerable saving in money, and more importantly, time. This "time saving" is particularly crucial in meeting the needs of our modern criminal justice system with its rising case-load and with the importance now being placed upon the defendant's fundamental right to a speedy trial. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

Thus, the respondent asks this Court to here (as it has so often done in recent years) and now re-examine its decades-old holding that the twelve member requirement is essential to retaining the fundamentals of the common law jury right. See *Thompson v. Utah*, 170 U.S. 343 (1898).

Reason and statistical experience demonstrate the efficiency of six man juries. Only the echos of the archaic past and the unsupported assertions of the petitioner call for the retention of twelve member juries. Respondent simply asks this Court to remain true to the admonition of Mr. Justice Holmes and to neither incorporate the twelve member requirement on the States nor retain it as an essential of the federal Sixth Amendment right.

CONCLUSION

The respondent respectfully submits that the petitioner has failed to demonstrate that any of the federal constitutional rights have been violated. In the absence of a clear showing that the current state of the law in Florida is violative of the federal Constitution, this Court is under no legal or moral obligation to reverse the decision before this Court.

The respondent has, without question, shown that the alleged constitutional abridgements are but figments of the legal imagination of the petitioner.

The State of Florida would respectfully urge that the decision of the District Court of Appeal be affirmed.

Respectfully submitted,

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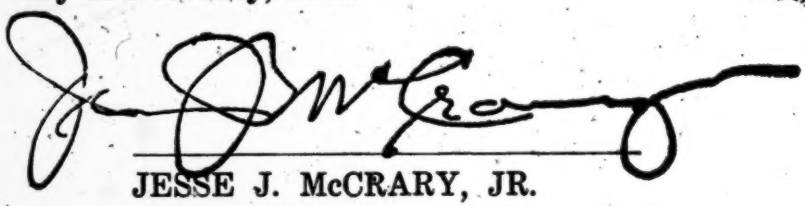
AFFIDAVIT OF SERVICE

I, JESSE J. McCRARY, JR., Assistant Attorney General, State of Florida, first being duly sworn according to law, to depose and say:

I HEREBY CERTIFY that three copies of the Brief of the Respondent to the Supreme Court of the United States was served upon HONORABLE RICHARD KANNER, 1150 N.W. 14th Street, Miami, Florida 33137, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 6th day of February, 1970.



JESSE J. McCRARY, JR.
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me at Miami, Dade County, Florida, this 6 day of February, 1970.

NOTARY PUBLIC
State of Florida
My Commission Expires:

APPENDIX A

Florida's Rule of Criminal Procedure 1.200

Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State propoes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given

by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule.

APPENDIX B

Florida's Rule of Criminal Procedure 1.220

VI. DISCOVERY

Rule 1.220 Discovery

(a) Production of Statement or Confessions, or Results or Reports of Physical or Mental Examinations, and of Defendant's Recorded Testimony Before Grand Jury. When a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried, the court shall order the prosecuting attorney:

(1) To permit the defendant to inspect and copy or photograph the defendant's written or recorded statements or confessions, if any, whether signed or unsigned.

(2) To permit the defendant to inspect and copy or photograph results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof, which are known by the prosecutor to be within the possession, custody, or control, of the state; and,

(3) To permit the defendant to inspect and copy or photograph the recorded testimony of the defendant before a grand jury, if any.

The order shall specify the time, place and manner of making the inspections and of making copies or photographs and may prescribe such terms and conditions as are just.

(b) Production of Other Documents and Things for Inspection, Copying or Photographing. When a crime is alleged to have been committed and the evidence of the state shall relate to ballistics, firearms identification, fingerprints, blood, semen, or other stains or documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature, the court shall order the state to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things. At any examination to be conducted by representatives of the state as to ballistics, firearms identification, fingerprints, blood, semen, and other stains, the defendant, upon motion and notice, shall be permitted by order of court, to be present, or have present an expert of his own selection, or both, during the course of such examination. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just.

(c) Reciprocal Discovery. If the court grants relief sought by the defendant under (a) (2), or (b) of this rule, it shall condition its order by requiring that the defendant permit the state to inspect, copy or photograph scientific or medical reports, books, papers, documents, or tangible objects which the defendant intends to produce at the trial and which are within his possession, custody, or control.

(d) Disclosure of Witnesses Supplying Basis for Charge. It shall not be necessary to endorse on any indictment or information, the names and addresses of the wit-

nesses on whose evidence the same is based, but upon motion of the defendant the court shall order the prosecuting attorney to furnish the names and addresses of such witnesses.

(e) **Exchange of Witness Lists.** In addition to, or instead of, the practice described in Rule 1.220(d) when a person is charged with an offense he may at any time after the filing of the indictment or information against him, or the affidavit upon which the defendant is to be tried, file in the cause an offer in writing (a copy of which offer shall be furnished to the prosecuting attorney) to furnish to the prosecuting attorney a list of all witnesses with their addresses and whereabouts if known whom the defendant expects to call as defense witnesses at the trial, whereupon, within five days after receipt of same by the prosecuting attorney, or within six days after the mailing of same to the prosecuting attorney, whichever shall be earlier, the prosecuting attorney shall file with the clerk and furnish to the person charged, a list of all witnesses known to the prosecuting attorney to have information which may be relevant to the offense charged, and to any defense of the person charged with respect thereto; and, within five days after the prosecuting attorney files with the clerk and furnishes such list of witnesses to the defendant, or within six days after the mailing of same to the defendant, whichever shall be earlier, the defendant shall file with the clerk and furnish to the prosecuting attorney a list of all witnesses whom the defendant expects to call as defense witnesses at the trial.

The prosecuting attorney may, prior to filing his list of witnesses, move the court for a protective order as provided in subsection (h) of this rule. The filing of a

motion for a protective order will automatically stay the times provided for in this subsection. If a protective order is granted the defendant may, within two days thereafter, or at any time before the prosecuting attorney files a list as required herein, withdraw his offer and not be required to furnish his list of witnesses.

(f) **Discovery Depositions.** When a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried and after notice to the prosecuting attorney, the court shall order the taking of the deposition of any person other than a confidential informer who will not be a witness at the trial, who may have information relevant to the offense charged and the defense of the person charged with respect thereto, on showing that the testimony of the witness may be material or relevant on the trial, or of assistance in the preparation of the defense of the person charged, and on showing that the witness will not cooperate in giving a voluntary, signed, written statement to the person charged or his attorney. The person charged shall give to the prosecuting attorney written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of the prosecuting attorney, the court ordering the deposition may, for good cause shown, extend or shorten the time and may change the place of taking. A deposition under this section shall be taken in the manner provided in the Florida Rules of Civil Procedure, and the scope of examination, on such deposition, and as to the written statement above shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for

the purpose of contradicting or impeaching the testimony of the deponent as a witness. An order to take depositions authorizes the issuance of subpoenas by the clerk of the court for the persons named or described therein. A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business, in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an offer or order for discovery under these rules, and prior to or during trial, a party discovers additional material which he would have been under a duty to disclose or produce at the time of such previous compliance, if it was then known to the party he shall promptly notify the other party or his attorney of the existence of the additional material in the same manner as required under these rules for initial discovery. If, at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Protective Orders. Upon a sufficient showing the court may, at any time, grant a protective order whereby the discovery contemplated by paragraphs (d), (e) and (f) hereof, is denied, restricted, or deferred, or

make such other order as is appropriate and may alter the time of compliance provided for herein. Upon motion by the prosecuting attorney the court may permit the state to make such showing, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following a showing to the court alone, the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(i) **Costs of Indigents.** After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(j) **Application of Rule to County Judge's and Justice of the Peace Courts Having Irregular or No Prosecutors.** In a county judge's court or a court of a justice of the peace in which there is no prosecutor who can be required to meet the obligations of the state as provided for in this rule, the judge or justice of the peace shall meet such obligations in so far as it is reasonable to do so, including the issuance of appropriate orders to the affiant responsible for making the affidavit upon which the defendant is to be tried.

APPENDIX C

Federal Rules of Criminal Procedure, Rule 16.

Rule 16 Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in

connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such

other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

As amended Feb. 28, 1966, eff. July 1, 1966.